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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

KELLY KEYSER, a Minor, etc.,

Plaintiff and Appellant,

v.

JURUPA UNIFIED SCHOOL DISTRICT  
et al.,

Defendants and Respondents.

E031809

(Super.Ct.No. 355924)

OPINION

APPEAL from the Superior Court of Riverside County. Robert George Spitzer,  
Judge. Affirmed.

Law Offices of David Hoffman and David Hoffman for Plaintiffs and Appellants.

Best Best & Krieger, Victor L. Wolf and Maria E. Gless for Defendants and  
Respondents.

In an action by a student against her teacher and school district for damages  
allegedly caused by the defendants' negligent failure to supervise the student during

recess, the defendants successfully moved for summary judgment on the ground that the plaintiff could not prove causation. Finding no error, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2000, Kelly Keyser was a five-year-old kindergarten student attending an elementary school in the Jurupa Unified School District. While playing during recess, she apparently fell, fracturing her nose.

In March of 2001, Keyser, through a guardian ad litem, sued the district and Sheila Ramirez, the teacher assigned the responsibility of supervising the kindergartners' recess. The complaint was pleaded in a single count, seeking damages for negligence. Although specifically directed at the defendants' alleged failure to supervise the kindergartners, it also referred to a dangerous condition caused by the placement of a balance beam too close to a concrete border. Keyser alleged that she had tripped and fallen over the balance beam and that she had struck the concrete border.

In December of 2001, Keyser moved for summary adjudication of a variety of issues, arguing that it was undisputed that Ramirez had owed a duty of care to Keyser and had breached that duty, and that several of the defenses alleged by the defendants were meritless. That motion was denied in January of 2002. Keyser promptly petitioned this court for a writ of mandate, challenging that ruling. (E031054.) We summarily denied that petition.

Also in January of 2002, the defendants moved for summary judgment on the ground that Keyser could not prove that the defendants' alleged failure to supervise

proximately caused Keyser's injury. Over Keyser's opposition, the trial court granted that motion. Keyser appeals from the resulting judgment.

### CONTENTIONS

Keyser contends that her complaint asserts claims both for negligence and for dangerous condition of public property, and that the trial court erred by denying her application to continue the hearing on the summary judgment motion, by granting the motion for summary judgment, and by denying her motion for summary adjudication.

### ANALYSIS

#### A. KEYSER DID NOT PLEAD A CLAIM FOR LIABILITY FOR A DANGEROUS CONDITION OF PUBLIC PROPERTY.

A motion for summary judgment is properly granted if the moving party has shown "that there is no triable issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c), emphasis added.) Because the only material facts are those that relate to the issues framed by the pleadings (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1432; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381), a defendant moving for summary judgment need address only the issues raised by the complaint (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4). The first step of our analysis, therefore, is to identify the factual issues raised by any theory reasonably contemplated by the complaint. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.)

Interpreting Keyser's complaint as asserting a single theory of liability, i.e., negligent supervision, the defendants moved for summary judgment on the ground that one of the elements of that cause of action could not be proven. Keyser not only disputes the merits of the motion on that ground, but also contends that the complaint raises a second theory of liability: dangerous condition of public property.

Keyser relies on paragraph No. 8 of her second amended complaint, which provides: "Defendants, and each of them, were, among other things, obligated to reasonably care for, monitor, manage and supervise the kindergarten children in their charge at school, including the plaintiff minor, and to prevent them from being exposed to unreasonable risks of injury and harm. Defendants, and each of them, breached their duties to the plaintiff minor by failing to reasonably supervise and monitor the children in the school yard during recess. On the date of the incident, defendant Ramirez was in charge of approximately 40 students, including the plaintiff minor, while her counterpart, another kindergarten teacher, was on scheduled break. During this time, defendant Ramirez left the area where the kindergarten children were playing and did not have a certificated employee take her place and nor did she call for [the principal] or his delegate to supervise the children. While defendant Ramirez was away and no certificated employee was present, the kindergarten children were not reasonably supervised and the plaintiff minor was severely injured in a fall over balance beam equipment that was positioned by the defendants in a dangerous manner because of its proximity to a

cement/concrete border, which heightened the risk of severe injury in the event of a trip and fall.”

That paragraph is ambiguous. On the one hand, it refers to a duty to prevent students “from being exposed to unreasonable risks of injury and harm” and to the risk presented by the placement of the balance beam, suggesting that some liability was being asserted on the basis of an alleged breach of that duty. But the only sentences alleging a breach refer solely to a breach of the duty to supervise.

That ambiguity is resolved, however, when paragraph No. 8 is interpreted in light of paragraph No. 7 of the same complaint: “At all times herein mentioned, plaintiff was within the class of persons who was intended to be benefited and protected by the provisions of, among other statutes, rules and regulations, Title 5, California Code of Regulations §5552, Education Code §§44807, [and] Government Code §815.2. Defendants and each of them are and were within the class of persons and entities that are regulated by said statutes, rules and regulations.”

Because all governmental tort liability is statutory, a plaintiff alleging the breach of a statutory obligation owed by a governmental entity must allege the statute or other enactment establishing the obligation alleged to have been breached. (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458; *Zuniga v. Housing Authority* (1995) 41 Cal.App.4th 82, 96.) Keyser amended her complaint to include paragraph No. 7 only after the defendants had demurred to the original complaint on the ground that Keyser had failed to comply with that requirement and the trial court had sustained the demurrer

on that basis. Therefore, the statutes and regulations enumerated by Keyser may be fairly expected to define the nature of the governmental tort liability she seeks to impose upon the defendants.

The statutes and rules cited in paragraph No. 7 deal with the duty of a principal<sup>1</sup> and of a teacher<sup>2</sup> to supervise students and with a public agency's vicarious liability for the torts of its employees.<sup>3</sup> None of them concern either the dangerous condition of public property in general or of school playgrounds in particular. Significantly, Keyser did not refer in her pleading to Government Code section 835, which defines the conditions under which a public entity may be liable for maintaining a dangerous condition of public property.<sup>4</sup> Nor has Keyser ever sought leave to amend her complaint to do so.<sup>5</sup>

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<sup>1</sup> "Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of the play, of the pupils of the school who are on the school grounds during recess and other intermissions and before and after school." (Cal. Code Regs., tit. 5, § 5552.)

<sup>2</sup> Education Code section 44807 provides in relevant part: "Every teacher in the public schools shall hold pupils to a strict account for their conduct . . . on the playgrounds, or during recess."

<sup>3</sup> "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2, subd. (a).)

<sup>4</sup> "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by

*[footnote continued on next page]*

Under these circumstances, a claim for damages on the theory of dangerous condition of public property is not reasonably contemplated by Keyser's complaint. No dangerous-condition claim having been asserted by Keyser, the defendants were not required to address that claim in their motion for summary judgment. Accordingly, we will analyze the order granting the motion for summary judgment solely as to the claim for negligent supervision.

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*[footnote continued from previous page]*

the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” (Gov. Code, § 835.)

<sup>5</sup> In her reply brief, Keyser argues for the first time that the trial court abused its discretion by failing to grant Keyser's oral request, made at the hearing on the motion for summary judgment, that she be allowed to file a third amended complaint. Given the timing of the request -- many months after the uncertain nature of the statutory liability being asserted had been repeatedly raised by demurrer and motion to strike, more than a month after the motion for summary judgment had been filed, an hour into the hearing on the summary judgment motion, and less than a month before the scheduled trial date -- we cannot say that the trial court abused its discretion by implicitly denying that request. Besides, although the proposed amended pleading is not in the record, at the hearing Keyser's counsel represented that the purpose of the amendment was to plead, not a claim for dangerous condition, but rather a claim for negligence per se based upon the alleged violations of section 5552 of title 5 of the Code of Regulations and section 44807 of the Education Code.

B. THE TRIAL COURT DID NOT ERR BY DENYING THE REQUEST TO CONTINUE THE HEARING ON THE MOTION FOR SUMMARY JUDGMENT.

“If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had . . . .” (Code Civ. Proc., § 437c, subd. (h).) If that showing is made, the trial court must deny the motion or continue the hearing, and the failure to do so is reversible error. (*Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 556-567.) If the requisite showing is lacking, then the trial court’s ruling on the request for continuance is reviewed for an abuse of discretion. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 313-314, 324-326.)

The defendants’ motion for summary judgment was filed on January 31, 2002, and set for hearing on March 7, 2002. In the opposition that Keyser filed on February 21, 2002, she asked for a continuance to allow her expert witness to examine the playground. In support of that request, Keyser’s attorney stated in a declaration that he had retained an expert in playground equipment and management who was scheduled to inspect the playground on March 22, 2002, and to be deposed that same day. The attorney also described the subjects on which the expert was expected to offer opinions. Keyser’s attorney concluded: “Accordingly, there is a reasonable and good faith basis to continue or deny the motion . . . .”

The trial court did not expressly rule on the request for continuance. However, by granting the defendants' motion, the court impliedly denied Keyser's request.

In contending that the trial court erred by doing so, Keyser argues that the continuance was justified because her counsel had represented that her expert "had reviewed most of the written materials and had already expressed criticisms of the positioning of the beam and the 'normal' supervision ratio during recess of 40 students to one teacher, given the age and maturity of the children."

Those facts are not "essential to justify opposition" to the motion for summary judgment. (Code Civ. Proc., § 437c, subd. (h).) In their motion, the defendants attacked a single element of the plaintiff's negligent-supervision cause of action: causation. An opinion regarding the location of the balance beam is relevant only to the unpleaded claim for liability on the basis of a dangerous condition of public property. An opinion as to whether one teacher could effectively supervise 40 kindergartners is relevant to whether the defendants breached a duty to supervise, but the defendants' motion does not challenge the existence of a breach of that duty. Accordingly, Keyser's inability to offer those opinions in time for the scheduled hearing on the motion for summary judgment did not require, much less justify, a continuance of that hearing. The trial court did not err by declining to continue the hearing.

C. KEYSER HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT.

To establish a cause of action for negligence, the plaintiff must prove “that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) In their motion for summary judgment, the defendants argued that, even assuming that they had owed a duty to supervise the children during recess and that they had breached that duty, they were nevertheless entitled to judgment because Keyser will be unable to establish causation, i.e., that their breach of their duty to supervise was a substantial cause of Keyser’s injury. The trial court agreed.

In determining whether the trial court correctly evaluated the summary judgment motion, we review the motion independently, without deferring to the trial court’s decision. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) However, the trial court’s ruling is presumed to be correct. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) It is not an appellate court’s role to construct theories or arguments that would rebut that presumption or otherwise undermine the judgment. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Instead, an appellant has the burden to overcome the presumption by affirmatively showing that the ruling was erroneous. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Accordingly, we review the ruling independently, but only concerning those claims of error that have been adequately raised and supported by the

appellant. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Keyser argues that the trial court erred, for four reasons. None have merit.

First, Keyser argues that the trial court's conclusion that there was no evidence of causation was incorrect because no prior serious accidents had occurred when there had been supervision, which permits an inference that the absence of supervision in this case caused the accident. She is mistaken. The evidence to which she refers merely states that students had tripped and fallen while being supervised but had not suffered serious injuries. Here, Keyser was injured when she tripped and fell. Therefore, the evidence on which she relies does not support the inference that she would not have been injured had there been supervision.

Second, Keyser contends that the school's official report of the accident was incomplete and misleading, and it may therefore be inferred that the defendants caused Keyser's injuries, citing *Fowler v. Seaton* (1964) 61 Cal.2d 681. In that case, a three-year-old child suffered a concussion while at a nursery school. (*Id.*, pp. 683-685.) It was "a severe and unusual injury, one that does not normally occur in nursery schools if the children are properly supervised." (*Id.*, p. 690.) The operator of the nursery school offered two different explanations (*id.*, pp. 684-685), both of which were "inferably false" (*id.*, p. 690). The Supreme Court held that, "[u]nder the circumstances it is inferable that defendant had a consciousness of guilt, knew the cause of the injury, was under a duty to explain, and was trying to conceal it. Thus it may be reasonably inferred

that the duty was violated.” (*Ibid.*) That was sufficient evidence to support the application of the doctrine of *res ipsa loquitur* and a judgment in favor of the plaintiff. (*Ibid.*)

Keyser’s reliance upon *Fowler v. Seaton* fails for several reasons. First, the trial court ruled that the report was inadmissible, and Keyser does not assign any error to that ruling in her opening brief.<sup>6</sup> Second, the inference of a consciousness of guilt, if any, that arises from an incomplete report is far weaker than the inference that arises from a false report. And third, *res ipsa loquitur* applies ““where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.”” (*Fowler, supra*, 61 Cal.2d at p. 686, quoting *Siverson v. Weber* (1962) 57 Cal.2d 834, 836; accord, *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.) Those prerequisites are not met here. Past experience tells us that, when a kindergartner trips and falls, the most probable explanation is *not* that the fall was caused by a teacher’s failure to supervise.

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<sup>6</sup> Keyser does, however, attempt to challenge that evidentiary ruling for the first time in her reply brief. By doing so, she violates the rule that an appellant’s opening brief should assert all the points on which the appellant relies. (*Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.) “Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.” (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) We may deem any new issue to have been waived unless good reason appears for the failure to present it in a timely fashion. (*Hibernia Sav. and Loan Soc.*, p. [footnote continued on next page])

Next, Keyser relies on *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756 for the proposition that the burden had shifted to the defendants to prove that their negligence had not caused her injuries. She is mistaken.

In a wrongful-death case involving the absence of lifeguards at a hotel's swimming pool, the *Haft* court held "that when there is a substantial probability that a defendant's negligence was the cause of an accident, and when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove 'proximate causation' conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury." (*Haft v. Lone Palm Hotel, supra*, 3 Cal.3d at p. 774, fn. 19.) Thus, a plaintiff must establish a "substantial probability" of causation as a condition precedent to a shift in the burden of proof on that issue. (*Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1427.) In *Haft*, there was a substantial probability that the hotel's negligence was a cause of the deaths in that case because the small size of the pool and the small number of people using it strongly suggested that a competent lifeguard exercising reasonable care would have been able to prevent the drownings. (*Haft*, p. 772.)

The instant case involves, not the situation in which a swimmer in distress flails about in the water until he or she drowns, but one in which a small child trips over an

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584; *Reichardt*, pp. 764-765.) No justification appearing here, we do not consider Keyser's belated assertion that the report was admissible.

obstacle. In the former, there is an opportunity for a lifeguard or other bystander to prevent the injury by intervening between the time the swimmer's distress becomes apparent and the time the swimmer drowns. In the latter, because the trip and the injury-causing impact with the ground are separated by no more than a second, there is no opportunity for intervention. The injury may only be prevented by preventing the trip itself. That is a difficult proposition, given the tendency of five-year-old children both to trip for no apparent reason and to forget to comply with instructions from adults.

Unlike the factual situation in *Haft v. Lone Palm Hotel*, it is not probable that the presence of a single teacher to supervise the 40 kindergartners playing on the playground would have prevented Keyser from tripping over the balance beam. To conclude that Ramirez could have prevented Keyser from tripping, we must assume that Ramirez would have noticed Keyser between the time that she began to run and the time that she tripped, that she would have called for Keyser to stop running, that Keyser would have heard her instruction, and that Keyser would have obeyed that instruction before reaching the balance beam. Each of those assumptions might be true, but it is not likely that all four conditions would be met. Therefore, there is not a "substantial probability" that Ramirez's negligent failure to stay on the playground was a cause of Keyser's accident, and the burden to prove causation did not shift from Keyser to the defendants.

Finally, Keyser argues that two cases cited by the defendants in their moving papers -- *Woodsmall v. Mt. Diablo etc. Sch. Dist.* (1961) 188 Cal.App.2d 262 and *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732 -- were

distinguishable from the instant case. But she does not explain how, assuming those cases are distinguishable, the trial court's ruling on the motion for summary judgment is incorrect.

For all these reasons, Keyser has failed to demonstrate error in the order granting the motion for summary judgment. Accordingly, that order and the resulting judgment must be affirmed. In light of that affirmance, we need not address her claims of error regarding the earlier order denying her motion for summary adjudication.

#### DISPOSITION

The summary judgment is affirmed. The defendants shall recover their costs on appeal.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

/s/ McKinster  
Acting P. J.

We concur:

/s/ Richli  
J.

/s/ Gaut  
J.